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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 917

JOHN C. O'CONNOR,

Petitioner,

—v.—

ELINOR O'CONNOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, JOINTLY OR IN THE ALTERNATIVE

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John C. O'Connor prays that a writ of certiorari issue to review the final judgment of the highest court of New Jersey possessing and exercising jurisdiction in this case in which the Supreme Court of New Jersey entered an order on the 19th day of September, 1967, denying a petition for certification to the Superior Court of New Jersey, Appellate Division—Part A, which had affirmed on the 18th day of May, 1967, the judgment *nisi* of the Superior Court of New Jersey, Chancery Division—Union County filed the 18th day of July, 1966 for divorce, the final judgment of the Chancery Division having been filed October 25, 1967.

Opinions Below

The findings of fact and opinion of the Chancery Division of the Superior Court of New Jersey are not reported (R. June 1, 1966, pp. 2-20).[1]

The *per curiam* opinion of the Appellate Division of the Superior Court of New Jersey is not reported (Appendix, *infra*, p. 24).

The denial of the Supreme Court of New Jersey of the petition for certification to the Appellate Division of the Superior Court of New Jersey is reported at 50 N.J. 296 (1967) (also Appendix, *infra*, p. 23).

Jurisdiction

The denial of the petition for certification to the court below by the Supreme Court of New Jersey was entered

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[1] "A" refers to Appendix of this Petition for Certiorari.

"R" refers to Transcript of Record in the trial court, the Superior Court of New Jersey, Chancery Division.

"O.A." refers to the appendix to the brief filed by John C. O'Connor in the Appellate Division of The Superior Court of New Jersey.

"C.A." refers to the appendix of the Petition for Certification in the Supreme Court of New Jersey.

"S.C.R. ( )" refers to the Record in the Supreme Court of New Jersey, as follows:

S.C.R. (1) Notice of Petition for Certification
S.C.R. (2) Petition for Certification
S.C.R. (3) Brief in opposition
S.C.R. (4) Order Denying Petition
S.C.R. (5) Motion for certification of federal question
S.C.R. (6) Affidavit in opposition
S.C.R. (7) Order denying motion
S.C.R. (8) Notice of petition for certiorari to the Supreme Court of the United States

on September 19, 1967 (Appendix, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

How Federal Question Is Presented

The court whose judgment is sought to be reviewed is the Supreme Court of New Jersey, before whom in the prosecution of petition for certification to the Superior Court of New Jersey, Appellate Division, and in the arguments by brief of that petition for certification (accompanied by the brief to the Appellate Division and transcript of record before the Chancery Division of the Superior Court of New Jersey), made in the Supreme Court of New Jersey, it was insisted and relied upon that the determinations of the Appellate Division in affirming the judgment *nisi* of the Chancery Division were repugnant to the *Constitution of the United States* and an arbitrary and oppressive State action against the petitioner and his family under the *14th Amendment, Section 1*, the *Due Process Clause* and the *Privileges and Immunities Clause*; and it became material to the determination of the case not to ignore these federal questions but the Supreme Court of New Jersey chose to deny the petition for certification (Appendix, *infra*, p. 23). Later, the Supreme Court of New Jersey denied, on October 17, 1967, a Motion for Certification of the Existence of a Federal Question (S.C.R. (5) and (7)).

On the 30th day of October, 1967, the Chancery Division ordered that the clerk of the Superior Court of New Jersey enter Final Judgment of Divorce *nunc pro tunc* as of October 25, 1967 (Appendix, *infra*, p. 25). The Final Judgment, Divorce, was filed October 25, 1967 (Appendix, *infra*, p. 26).

In his petition for certification addressed to the Supreme Court of New Jersey and filed June 28, 1967, under "Statement of the Case," the following is an exact quotation:

"The CONSTITUTIONAL questions arising are as follows:

FIRST: Whether it is repugnant to the *U.S. Constitution* under its *Amendments, Article 14, Section I,* for the trial court and the Appellate Division to have disregarded evidence rationally bearing upon fraud, with the consequence that the hearing determining credibility was inadequate and an adequate hearing on fraud was not afforded?" (S.C.R. (2), p. 8)

"SECOND: * * *" (omitted because it refers to New Jersey Constitution).

"THIRD: Whether it is repugnant to the *U.S. Constitution* under the *Amendments, Article 14, Section I,* when the course of action whereby the Court sought to examine the rights and remedy the wrongs was permeated with an absence of fairness that fatally infected the whole of the proceedings and especially the trial; plus the utter failure *of Parens Patriae* to protect the children in their longing for and preference for both parents living together" (S.C.R. (2), p. 9).

Under "Argument" in his petition for certification, the following is said:

"The decision below, affirming the Judgment Nisi of the Superior Court of New Jersey, Chancery Division, is clearly incorrect.

The Constitutional limitations in the *14th Amendment* and in the Due Process clauses of the State Con-

stitution are the safeguard of the fundamental rights sought against arbitrary and oppressive state action against the defendant and his family" (S.C.R. (2), p. 9).

Constitutional Questions Properly and Timely Raised

In the Supreme Court Rules of 1967 *"Rules Governing the New Jersey Courts,"* Chapter III. Appeals on Certification, R.R. 1:10-4(e), the rule is:

> "Where certification is sought to review a judgment or order of the Appellate Division, and it appears that the petitioner was entitled to an appeal as of right, certification shall be granted. An application for certification shall not constitute a waiver of any right of appeal the petitioner may have."

The above rule is discussed in 19 *N.J. Practice (Lodge, Skills and Methods)*, Section 5, as follows:

> "The Court has said, 'in any case where the right to appeal from the Appellate Division *is not clear beyond doubt, the proposed appellant should petition for certification, outlining fully his claim to an appeal as of right,* as well *as any other appropriate reasons indicating why this court should allow further review even if it believes that the case does not present a sufficient constitutional question.* The court will then have before it the complete appendix and the briefs below. *If a proper constitutional question does appear, the rules provide that "certification shall be granted." R.R. 1:10–4(e).* If it does not, an appeal may be allowed through certification for other reasons. *In no*

case will a litigant suffer by falling between the millstones and this court will be better able to fulfill its proper function.'"

Questions Presented

The first question presented for resolution in this petition is whether the opportunity to be heard respecting the justice of the judgment was so dominated by arbitrary and oppressive attitudes which substitute the "Marriage Breakdown" concept for the "Marital Offense" concept that State, court, action in this case violated due process:

By allowing plaintiff wife to prevail in her action for divorce, NOT on her Original Complaint,	of 1,900 words, devoid of a cause of action except for a woman's right to change her mind, at will and without advancing any cause whatever, but rather,
On her Amended Complaint,	of 8,500 words, which was allowed to be filed about 16 months after filing the Original Complaint, because as the Court said, "I have read all papers in this case and find no cause for granting a divorce."
To a Judgment Nisi,	Of the Chancery Division, Superior Court of New Jersey,

Affirmed,	By Appellate Division, Superior Court, Nor on the basis of the findings of the trial court or the proofs as a whole, but rather on a new finding of, "Sufficient credible evidence in the whole of the record" of about 400,000 words.
Review on Certification, DENIED,	By the Supreme Court of New Jersey, in spite of petitioner's assertion that constitutional rights had been violated and specifically: That the trial court and Appellate Division disregarded evidence rationally bearing on fraud; that the Court's examination and action in the case was permeated with an absence of fairness; that the judgments were arbitrary and the State's actions were oppressive, citing the 14th Amendment.

The second question presented is whether the Privileges and Immunities guaranteed in the 14th Amendment have been violated by oppressive restriction of normal visitation between parent and child, for a period of time amounting to 70% of the child's life, he is now age 4, said oppressive restriction having been imposed for several reasons, one of which was to promote agitation between the parties with

the hope that a cause of action would arise for divorce as the case was devoid of one, but that hope never materialized and the oppressive restriction continued on even after the issuance of a judgment *nisi* and appeals, with the result that the United States citizenship guaranteed right to the "Enjoyment of life and liberty . . . and to pursue and obtain happiness" by the boy and his father was curtailed to such an extent that in the year 1967 only 2 visits had the approval of plaintiff wife. The boy and his father have had to resort to illegal visitation. The Court once boasted it could enforce its visitation orders and directed defendant to trespass onto property it had taken away from him and given to plaintiff, the marital home, but the boast fell when the higher court to which the matter was appealed reversed the order.

Constitutional Provisions Involved

Constitution of the United States, Amendment XIV. Section 1.

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

Title 28, *United States Code*, Section 1652.

> "The laws of the several States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

N.J.S.A. 2A:34-2. Causes for divorce in New Jersey.

The grounds for divorce are set forth in the Revision of 1951: "Divorce from the bond of matrimony may be adjudged for the following causes:

a. Adultery;

b. Willful, continued and obstinate desertion for the term of 2 years;

c. Extreme Cruelty, whether the acts of cruelty have been heretofore or are hereafter committed; provided, that no complaint for divorce on the ground of extreme cruelty shall be filed until after 6 months from the date of the last act of cruelty complained of in the complaint, but this proviso shall not be held to apply to any counterclaim."

Statement

Petitioner was shocked with sudden surprise on June 1, 1966 at the bench opinion of the trial court and the reasons advanced for a judgment nisi for plaintiff-wife (R. 2-22, June 1, 1966 Book 2 Excerpt). Petitioner had thought that he had convinced the court that the Amended Complaint

was a complete fabrication, that the testimony of plaintiff and her sister on every matter relating to cruelty was perjury and that plaintiff had coerced her housekeeper into writing letters containing falsehoods.

Petitioner attempted to prove the perjury and fabrication by both testimony and internal evidence in papers filed in the case in his appeal, with new evidence presented in the appendix to brief before the Appellate Division of the Superior Court of New Jersey (O.A. 44a-101a) balanced against plaintiff's testimony (R. 107, May 10, 1966) where can be read:

"*By the Court* (questioning plaintiff):

Q. Do you mean that you had at least enough to get along with until 1963 but in 1963 you ceased to have sufficient food to subsist on? Is that what you mean? A. Yes."

The new evidence above mentioned comprised checks written by plaintiff and defendant for exclusively family expenses totaling $6,124.99, but this and all other proof of perjury by plaintiff were to no avail.

Petitioner then carried his appeal one step higher to the Supreme Court of New Jersey and in his appendix on brief to that court (C.A. 2a-45a) or (R. 1215-1257 of May 31, 1966), presented the testimony of his three daughters, balanced against the testimony of the plaintiff and other statements in the record (C.A. 46a-94a); again demonstrating perjury by plaintiff, on matters which the Appellate Division had asked many question about, particularly the plaintiff's accusation that defendant had accused plaintiff of committing adultery and poisoning the minds of the children against the plaintiff (C.A. 46a-49a).

Defendant had testified at (R. 1016 of Transcript May 26, 1966) or at (C.A. 65a) that he had told the children, while explaining to them what the three grounds for divorce were in New Jersey, that:

> "When two people are married, they are married forever before God, and divorce, even if there is a divorce, cannot break the bond of marriage" and that "If Mother should get a divorce and remarry she would be as far as the Church is concerned living in adultery, living with another man."

This was the alleged accusation of adultery.

Stage at Which Federal Questions Were Raised

This was the place in the proceedings that defendant realized that he was up against a State constitutional question concerning Right of Conscience and Religious Freedom.

Furthermore at this stage he realized that something was wrong with his understanding of the way the courts of New Jersey were deciding divorce cases, or that there may be a violation of the 14th Amendment to the United States Constitution.

Defendant reviewed the record and concluded that the courts had violated the 14th Amendment on two counts, one being Due Process and the other being the Privileges and Immunities clause.

The facts material to the Due Process violation are as follows:

1. Every time that defendant overcame one of the allegations of plaintiff the court would move on to another

like the pied piper dancing on ahead. At the very beginning of the hearing before the Appellate Division the Court said from the bench, "Our determination in this case will not be determined solely on matters presented on briefs but rather on the entire record." Defendant's brief had squarely challenged every point which the trial judge used to support his judgment nisi, but the Appellate Division's Opinion made no mention of any of these and further their Opinion made no mention of the accusations of adultery, which they inquired about.

2. After the trial was over and certain motions were on the calendar of the trial court judge, the defendant asked questions in an effort to determine why he had decided the case in favor of plaintiff. On January 20, 1967 the Court said, " . . . but one thing I will not do is frustrate your appeal so you will be satisfied that you have got justice and if you are successful in your appeal I will be delighted if I am wrong as far as your marriage is concerned but it is no secret that it would be one of the most surprising things I have ever seen if Mrs. O'Connor's attitude toward you should sufficiently reform that she would be willing to let you come back to the marital home. I would be delighted but one very surprised man" (O.A. 898a).

Still further on in the transcript the Court said,

> "Mrs. O'Connor, I understand you have difficulty in understanding you have to accept this court's feeling that it just does not want to be in a position of appearing to be trying to keep Mr. O'Connor from testing my legal position. It is a matter of my own personal conscience. I have to take the position I have taken. I cannot do otherwise. I want him to have every chance

he can to finish the appeal because as I said, he thinks I made the wrong decision and that winning the appeal will change your attitude toward him. That only time will tell but I will be more surprised to see the marriage revived than I would be to see him win the appeal. Let's hope I'm wrong" (O.A. 899a).

Facts material to the Privileges and Immunities violation are:

1. In a letter dated March 2, 1965 (A. 23), the Court said,

"Children need both parents. However in the existing domestic turmoil and Mrs. O'Connor's highly emotional state, undoubtedly caused or aggravated by Mr. O'Connor's failure to face up to his responsibilities, it will be inimical to the welfare of the children and the parties to permit him at this time to return to the marital home to reside or even visit."

2. The spirit of the above quotation has permeated this case to the present. There has been visitation but it has had to be at times other than designated times, because the Court, although it was asked to enforce its visitation orders never did so. On one occasion the Court attempted to penalize the plaintiff wife for violating its visitation orders, but this was appealed (A. 712-66). The Opinion dated Dec. 5, 1967 (A. 46), *infra,* reads, in part:

". . . we ascertained that plaintiff is gainfully employed outside the home to supplement the amounts received from defendant. By reason thereof and her further time spent away from home in studying law, plaintiff is not at the family hearth between 5 P.M. and 6 P.M. to give the children their evening meal.

Defendant states that he takes care of this daily need. (Petitioner's Note—He would like to take care of this daily need. At present he merely augments their grocery supplies.)

. . . We do not, however, agree with the trial court's authorizing defendant to enter plaintiff's home without her permission to effect his rights of visitation. Defendant's visitation rights can be insured by means other than the sanctioning of what otherwise would be a trespass. Nor may defendant justify his unwanted intrusions into plaintiff's home by his allegation that the children invited him in. . . ."

NOTE: There are four children, ages 16, 14, 13 and 4.

The home was found by the trial court to be plaintiff's in spite of defendant's allegation that he paid for it and ownership was agreed to be joint.

Reasons for Granting the Writ

The Supreme Court of New Jersey has sanctioned a judicial proceeding which has so far departed from the reasonable exercise of judicial power over its own process and practice that abuse has occurred and oppression and injustice have violated federally guaranteed rights, calling for an exercise of the power of supervision of the United States Supreme Court.

The abuse was the arbitrary determination by judges, who have issued orders in this case from the earliest motion for pendente lite support, on the basis that the marriage was dead when the wife filed a Complaint for divorce,

and that from that point on the function of the State was to give the marriage a proper burial (A. 48).

The oppression was to crush by an abuse of police power the normal unlimited visiting right of a parent with a child. The purpose of this excessive use of authority was to foster argument between the husband and wife with the hope that something would evolve which would become a cause for divorce under the laws of the State of New Jersey (A. 23), for the reason that the Original Complaint did not contain a cause of action (O.A. 261a). At an early stage the Court wrote a letter, ". . . it will be inimical to the welfare of the children and the parties to permit him (Defendant) at this time (March 2, 1965) to return to the marital home or even visit" (A. 23). The spirit of the above quotation has permeated this case to the present and has covered 70% of the life span of the son of the parties, violating the fundamental Privileges and Immunities of both father and son. Illegal visitation however has been achieved and defendant has been held to be in contempt of Court, and that this illegal trespass onto property which the Court ruled was the property of plaintiff, no matter how it came to be recorded only in the name of plaintiff, though paid for by defendant, upset the plaintiff. The degree of this upset colored the trial court's assessment of credibility at the divorce trial and tended to convince him he had made the right decision in the first place, in 1964 when he allowed pendente lite support. The magnitude of this upset of plaintiff over visitation is referred to in the opinion of the Appellate Division in a companion case decided Dec. 5, 1967, as follows:

> "We are also concerned, on the basis of information in the transcript, that serious consequences might re-

sult during the exercise of defendant's entry, if their respective emotions flared up beyond control" (A. 46).

The reference to the transcript was over visitation in or out of the house:

> "Mrs. O'Connor: You must excuse me. Judge Wood, I will buy a gun and I will shoot, because I cannot have him around. . . ." (O.A. 901a).

At the time this remark was made, March 17, 1967, the appeal of the judgment nisi of Judge Wood had not been heard, but Judge Wood, the trial judge, no longer was bound to make findings which would support a judgment of divorce. He simply didn't believe plaintiff would do any shooting and he proceeded to issue an order for defendant to enter the plaintiff's house for purposes of visitation.

The Appellate Division, however, when it reviewed the judgment nisi, did not know about the trial court's change of conviction about the credibility of the plaintiff and his new willingness to resist all forms of intimidation by the plaintiff. The Appellate Division did *not* find sufficient credible evidence present in the record; considering the proofs as a whole. The opinion of the Appellate Division said it found, ". . . sufficient credible evidence present in the whole of the record to support the judgment under review, giving due regard to the trial judge's assessment of credibility" (A. 20). The whole of the record however contained the above transcript quotation of March 17, 1967 at (O.A. 901a), about shooting.

The above opinion of the Appellate Division can be said to be a new finding. They certainly did not affirm the decision of the trial court on the basis of any of the bench

opinions or reasons given in the record. The Appellate Division cited *State* v. *Johnson,* 42 *N.J.* 146, 159-161 (1964), which signifies that they did not necessarily find identical factual inferences from the case, although they did not experience a "feeling of wrongness" with the judgment nisi. *State* v. *Johnson,* 42 *N.J.* 146 at 162.

Defendant then petitioned the Supreme Court of New Jersey to determine that both Courts below were clearly in error, the trial court in error on the reasons advanced in defendant's brief before the Appellate Division and which the Appellate Division did not reject, the Appellate Division in error in affirming a judgment for divorce, based upon an indefinite, "the whole of the record" and not upon any one, much less more, acts of cruelty, as required by New Jersey Statutes (A. 20). Defendant also petitioned on the existence of Federal Questions, in the case.

The real question is why did all these judges make the judgment which they made? On January 20, 1967 at a motion hearing, the trial court judge said:

> "I know from conversations with Mr. O'Connor in this court that he firmly believed that he was going to win the divorce before this court and also believed that when he won it, his marriage would be revived and he would have a happy home once again. He still believes that. He still believes that he is going to win the appeal and he believes that when he wins he is going to be able to return home and resume a happy marriage. I of course do not believe he will win the appeal or I would have decided the case the other way. Of course, the Appellate Division may not agree with me but I have been wrong before and the Appellate Division may well reverse me. If the Appellate Divi-

> sion reverses me, Mr. O'Connor will have been justified in spending his $1800.00. I will be one surprised boy, very surprised indeed, if and when he wins, if he is able to resume his marital relations. Having seen the relationship of the parties, it is my unfortunate belief the marriage is hopelessly lost no matter what, but this is their business and not mine" (O.A. 896a).

In this statement of the trial judge, "I will be one surprised boy . . . if and when he wins, if he is able to resume his marital relations," rests the invincible prejudice of the courts. Such an attitude is almost impossible to surmount in divorce matters. How else could a trial court accumulate 400,000 words of testimony, and find no corroborated evidence of cruelty (see Tabular Synopsis—O.A. 9), and still come up with a judgment for divorce, especially in the face of three daughters' testimony of proof of the total absence of cruelty (R. 1215-1257) or (C.A. 3a-45a).

On top of this comes the Appellate Division, consisting of three judges with the same outlook on "Marriage Breakdown". They are not going to look for a way to keep "Holy deadlock" going. On the contrary they are going to look for a way to "Bury a dead marriage"; which in short asks, can there be due process in an arbitrary divorce decision? The answer is no, for the reason that no one can defend himself, as is obvious in the instant case with the continuous shifting of the factual basis for the judgment from court to court and finally terminating in the nebulous "the whole of the record".

The reforming of divorce laws in the direction of widening the grounds for divorce, now in progress in many States, affects the consciences of Chancery judges. The

number of cases in which a judge must rely on his conscience is very great. Whether to balance the decision in the direction of the rights of the family as a natural society based on indissoluble matrimony, or to destroy the substance of matrimony by a judgment for divorce, separating the mother and father and curtailing the unlimited visitation of one of them with their children, is a hard choice. The trend, that "marriage breakdown" is a wiser concept to follow in divorce proceedings than "marital offense", puts a greater strain on a conscientious judge. The present case, with "credibility a significant element" is a type of case involving crushingly vital rights which depend solely on the conscience of one judge.

Each decision in the present case can be shown to have been based entirely on the foundation of "marriage breakdown theory", from the first judgment to allow "pendente lite" support payments, followed by the judgment to allow the filing of an Amended Complaint because the Original Complaint did not contain grounds for a divorce and the judge believed the marriage had "broken-down", and so on up through the trial court in Chancery, then the Appellate Division and denial of review by the Supreme Court of New Jersey.

It is almost impossible to conceive of a defense which can succeed against such an attitude.

What the Supreme Court of the United States can teach if it reviews this case are some of the fundamentals of, or what is a definition of, "marriage breakdown" which can be used by all courts, and which types of these "breakdowns" can be used as bases for divorce and which cannot.

For example, is there a true marriage breakdown if a woman files a complaint signifying she wants out of a mar-

riage at the time that she is passing through the menopause either natural or produced surgically by destruction of the ovaries? From this time on she is incapable of one of the primary functions of marriage, the procreation of children. But does this mean that the matrimonial status of the parties should be destroyed by the arbitrary decision of a trial judge who in his observation of the woman notices her nervousness, tension and irritability and anger at the slightest provocation at details of orders affecting the divorce proceedings such as visitation privileges or the amount of support.

It is not suggested that federal review of State procedure in divorce cases, in which the State has adopted a "marriage breakdown" criterion, should go one iota beyond the point that due process is violated in the interpretation of that criterion.

Divorce is the destruction of one of the most fundamental rights, the right to marry and remain married and to enjoy the children created by the marriage and for the children to enjoy their parents unlimitedly as to visitation.

Due process can be easily destroyed in the exercise of State police power exerted in divorce proceedings. The power is so enormous that families are reduced to the condition of their ancestors who had to live in caves close to the shore of the sea because their weapons were not strong enough to kill the great beasts inhabiting the interior.

The Privileges and Immunities guaranteed by the 14th Amendment can also be destroyed by divorce proceedings. Consider the action taken by the Court in the failure to provide visitation between petitioner and his infant son

beginning when the boy was 1½ years old and continuing through this date with the boy now 4½ years old.

Here we have a conflict between the Court's experience with trespass and the rights guaranteed in the Privileges and Immunities clause. Picture a small boy standing at the threshold of the house in which he lives. His mother is not home. She, as far as he is concerned is almost never home during the week. She comes home after he is asleep. In the morning, in spite of the fact that he is only 4 years old, he gets his own breakfast. After his mother gets up she takes him to nursery school anywhere from 9:00 to 11:00 A.M. where he stays until 4:00 or 5:00 P.M. When his father comes to the house at 5:00 P.M. he occasionally asks him to step in, but the father has to decline on Court Order. The house and everything in it were supplied by the father. The Court has "found" the father guilty of extreme cruelty toward the mother, although not one item of extreme cruelty could be corroborated by anyone. Even before the trial the various judges, in their letters and orders, indicated that they were certain the marriage was hopelessly lost, on the basis of his mother's attitudes and behavior pattern in court. Now is not the State restraint imposed upon the father, even though a judgment nisi for divorce has issued, to accept his son's invitation to enter the boy's home, when the mother is absent, an abridgment of the rights, Privileges and Immunities of the son taken by himself, or the father by himself, or the father and son taken together?

Consider a cavedwelling man driven from the cave by his wife. Did he not have the parental right to go into the cave, when his wife was away, to make sure that his son was warm, or fed, or just plain wanted his father's company? It is doubtful that a stone age Supreme Court would

deny either son or father that privilege and would hold them immune to the complaints of the wife. Parens Patriae of the primitive State would approve the protective actions of the father.

CONCLUSION

The Court below has decided an important question of federal law involving the Due Process of Law Clause and the Privileges and Immunities Clause which has not been but should be corrected by this Court for the reasons stated above and because after this correction of the federal rights a different judgment will have to be rendered by the State Court. It might be impossible to change the opinion of the State Court that, "Once a complaint for divorce is filed a marriage is on the rocks" or that, "No marriage can survive a divorce trial and the State's only function is to see that the marriage has a proper burial," but the Supreme Court can teach that these opinions will lead to wrong judgments when Due Process is violated or the Privileges and Immunities of United States Citizens is abridged.

The petition for certiorari should therefore be granted.

Respectfully submitted,

JOHN C. O'CONNOR, *Pro Se*

December 11, 1967

APPENDIX

(Copies of opinions and judgments below and companion cases.)

Opinion—Denial of Petition for Certification

Docket No. 5675

Supreme Court of New Jersey, reported at 50 *N.J.* 296 (1967).

"To Appellate Division of the Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 19th day of September, 1967."

deny either son or father that privilege and would hold them immune to the complaints of the wife. Parens Patriae of the primitive State would approve the protective actions of the father.

CONCLUSION

The Court below has decided an important question of federal law involving the Due Process of Law Clause and the Privileges and Immunities Clause which has not been but should be corrected by this Court for the reasons stated above and because after this correction of the federal rights a different judgment will have to be rendered by the State Court. It might be impossible to change the opinion of the State Court that, "Once a complaint for divorce is filed a marriage is on the rocks" or that, "No marriage can survive a divorce trial and the State's only function is to see that the marriage has a proper burial," but the Supreme Court can teach that these opinions will lead to wrong judgments when Due Process is violated or the Privileges and Immunities of United States Citizens is abridged.

The petition for certiorari should therefore be granted.

Respectfully submitted,

JOHN C. O'CONOR, *Pro Se*

December 12, 1967

APPENDIX

(Copies of opinions and judgments below and companion cases.)

Opinion—Denial of Petition for Certification

Docket No. 5675

Supreme Court of New Jersey, reported at 50 *N.J.* 296 (1967),

"To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 19th day of September, 1967."

Opinion, Appellate Division

Docket No. 1355-65

Superior Court of New Jersey, not reported.

The main case, Docket No. 1355-65.

Argued May 15, 1967—Decided May 18, 1967.

Before Judges Goldmann, Kilkenny and Collester.

On appeal from the Superior Court, Chancery Division, Union County.

PER CURIAM:

> "Defendant appeals from a judgment granting plaintiff a divorce on the ground of his extreme cruelty and denying his counterclaim for an interest in the premises owned and occupied by her.
>
> The trial was unduly protracted. As is generally true, the case is entirely factual and credibility a significant element. We find sufficient credible evidence present in the whole of the record to support the judgment under review, giving due regard to the trial judge's assessment of credibility. *State* v. *Johnson,* 42 *N.J.* 146, 159-161 (1964)."

Affirmed.

Order to Enter Final Judgment

The Court having entered a Judgment Nisi in this matter on July 18, 1966, and the Appellate Division having affirmed the Judgment Nisi and entered its Mandate on May 18, 1967, and the Supreme Court having entered its Order Denying Petition for Certification on September 19, 1967, and the Appellate Division Mandate having issued, and the statutory period of three months since entry of the Judgment Nisi having been completed;

It is on this 30th day of October, 1967,

ORDERED that the Clerk of Superior Court of New Jersey enter Final Judgment of Divorce nunc pro tunc as of October 25, 1967.

WM. FILLMORE WOOD
J.S.C.

Final Judgment

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

UNION COUNTY

Judgment nisi having been entered in this cause on the 18th day of July 1966, dissolving the marriage between the parties unless within three months thereafter cause be shown why such judgment should not be made final, and no such cause appearing:

It is on this 25th day of October, 1967, ORDERED and ADJUDGED that the said judgment nisi be and is made absolute and that the marriage between the parties is dissolved.

FRANK J. KINGFIELD
J.S.C.

Order of Judge Wood of August 12, 1964 to Pay Pendente Lite Support

It is on this 12th day of August, 1964,

ORDERED that defendant, John C. O'Connor, pay to plaintiff the sum of $62.50 per week at the beginning of each week from the date of this Order and until further Order of this Court, through the Probation Office of Union County, for her support and maintenance and that of the infant children of the marriage in her custody, and

It is further ORDERED that plaintiff, Elinor O'Connor, pay the real estate taxes and mortgage payments on the residence, beginning as of August 1, 1964 from the support hereinbefore ordered to be paid to her, as well as utilities, food, ordinary medical and dental, clothes and insurance expenses for herself and said children, and

It is further ORDERED that plaintiff's Motion to require defendant to remove himself from the residence is denied.

WILLIAM FILLMORE WOOD
J.S.C.

Filed August 12, 1964

Letter—Order of the Court March 2, 1965

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

(Court emblem)

JULIUS KWALICK
JUDGE

COURT HOUSE
ELIZABETH, N. J.

March 2, 1965

Gentlemen:

I am deeply concerned as I know you are about the parties to the above titled action and their four delightful children who are unhappily caught up in a situation not of their making.

The seriousness of the situation and its many facets have been deliberated since you kind gentlemen left me with your clients and their children on Saturday last.

The problems are difficult but not insurmountable.

In my considered judgment there is hope for reconciliation of differences and reunion of the family.

The first move must be made by Mr. O'Connor. He is an intelligent and personable gentleman. He possesses talents which are not being fully utilized. It is my distinct impression that the invention on which he is presently working does not require his full time and that he can, with some effort and application obtain full time employment so that he may earn sufficient to maintain self, home and family.

He should also forthwith review all of the unpaid bills which according to Mrs. O'Connor are unpaid, including municipal taxes assessed against the marital home. I want to be informed at the earliest possible moment with respect to those bills concededly owed, the full names and addresses of the creditors and the amounts respectively due them.

If any item is seriously disputed by Mr. O'Connor but not questioned by Mrs. O'Connor I think it safe to rely on her representation that it is owed since she will not conceivably insist on payment of any item not actually due.

Any arrearage with respect to support should be forthwith met.

Children need both parents. However in the existing domestic turmoil and Mrs. O'Connor's highly emotional state, undoubtedly caused or aggravated by Mr. O'Connor's failure to face up to his responsibilities, it will be inimical to the welfare of the children and the parties to permit him at this time to return to the marital home to reside or even visit.

Please confer with respect to the foregoing and advise me of your progress, I shall gladly cooperate.

Respectfully yours,

/s/ JULIUS KWALICK
Julius Kwalick
J.C.C.
Temporarily Assigned

JK/fm

Opinion, Chancery Division

Docket No. M—5519—63

Superior Court of New Jersey, not reported.

The Bench Opinion:

Facts tried & argued May 5, 9, 10, 11, 12, 16, 17, 18, 23, 24, 25, 26, 31, and June 1, 1966—Decided June 1, 1966.

Before:

Judge William Fillmore Wood

On the Amended Complaint filed Oct. 7, 1965.

(The Original Complaint had been filed May 25, 1964.)

The Court: This is a suit by the plaintiff for an absolute divorce on the grounds of extreme cruelty, a counterclaim by the defendant for custody of the children and for a declaration that he has an interest in the house which is now in the name of the plaintiff and where the plaintiff and the children of the marriage now reside. The complaint is 29 pages long, the longest one I have ever seen in a matrimonial action, if I can recall correctly. As I have stated at the outset, there are a lot of things in the complaint which seemed to me then and it seems to me now are not cruelty.

I mentioned some when I was dealing with the motion to dismiss. Take for example the objection of the plaintiff to circumcision. Take as another example it seems to me the criticism of the defendant; that is, the objection of the defendant to circumcision, and the criticism of the

defendant of public schools. He has a right to his opinion as to public schools. We know from the testimony that there was a serious conflict between the plaintiff mother, and the defendant husband, as to what school the children should go to, and the mere criticism by the defendant of the public schools cannot in my opinion be cruelty any more so than the efforts of the plaintiff to frustrate the desires of the defendant to send them to a parochial school would be cruelty against him.

I think I commented during the course of the trial that I would put to one side any criticism of the defendant that he spent time contesting a tax case. The tax amount was some $26,000, although it was, according to the testimony, a claim against defendant's corporation, certainly it was not unreasonable for the defendant to spend a lot of time contesting that.

I mentioned also several times that both parties seem to harm the other with either cruelty or provocation, because the other got involved in these proceedings, plaintiff by way of complaint and the defendant by way of filing an answer to the complaint. This Court is here to hear litigation of the parties, and under no circumstances can it be considered a filing of a complaint as a provocation or the contesting of that complaint as cruelty.

May I say at this point I am well aware of the fact that we use a subjective standard in determining what items are cruelty and what are not, in that we determine whether or not the alleged acts damaged the plaintiff's health mentally or physically. I believe without question that all of the things that I have mentioned including those which I have just eliminated definitely upset the plaintiff to an extent damaged her health, but we have to use another

yardstick than in addition to the question as to whether or not plaintiff's health is damaged and that is whether or not the acts committed are acts which the defendant might reasonably expect would cause damage to the plaintiff's health. The acts which I have just eliminated I don't think can be reasonably expected to cause damage to the plaintiff's health.

Now to get down to certain items since there are so many and we have run out of time, I cannot make a specific finding with respect to each allegation in the complaint. I expect to pick some relevant ones, some that I consider relevant to the plaintiff's case and make a determination to facts with respect to them.

On the allegation of offensive language, I find as a fact that there was offensive language, and even though there was testimony that some of the language, at least might have been taken as a joke and there was testimony that the defendant intended this language as a joke, I find as a fact that the defendant knew full well that the language was offensive to the plaintiff, he knew full well that the plaintiff had gone to the defendant's priest and complained. She had complained to the defendant himself, so he knew that the language was offensive, and he continued to engage in it.

The issue that gave me the biggest trouble was that of inadequate support. I find as a fact, despite defendant's testimony to the contrary, that there was serious deprivation, both for heat and necessary food and clothing during the period especially in 1964 and in 1963 and in 1962. There is no question about it. The money which the defendant claimed that he "made available" to the family just

didn't reach the family. There is no question in my mind that that is so. That doesn't quite enter the question of whether or not that would be cruelty. This is something I am in serious conflict in my own mind. The real problem it seems or the principal problem with the defendant is that his baby, the one that he was most devoted to, was not his family, not his son as far as economics is concerned but the O'Connor Machine Tool Company or whatever the accurate name is, and what happened was that the money that he got he channeled into O'Connor Machine Tool Company. I think it is true and in fairness to him that he has unlimited faith in the future of this company and he has definite and serious hopes and expectations that this company is going to make a mint so that his family will have plenty, but while he is waiting for this he certainly closed his eyes to the pressing needs of the family today and yesterday and three years ago.

During a number of motions I had to compel the defendant to support his family. I think I was extremely lenient with the defendant. I went along for a period of some three months, if I recall correctly, saying to the defendant, "You think you are going to get some money next month? Okay. We will wait until next month."

Eventually recognizing the seriousness, I ordered the defendant to get a job which was available to him, one which was not as lucrative as he thought he could earn or as lucrative as he thought his business would be, but one which was very much needed. He got that job and promptly advised the Court that even though he didn't want to get the job, now that he has it on the Court's orders he must use all of his salary for his business and for his personal

needs. This is the first time that this Court became disillusioned with the defendant's attitude toward the financial support of his family.

I had in front of me a moment ago the letter which the defendant wrote to Mr. Heckert which came to the Court's attention. It is a letter of February 9, 1966. The file on Mr. Heckert is in evidence. At least it seems to me that when a person closes his eyes even with the best of intentions to serious needs of his family and leaves them in great necessity circumstances, that should be considered extreme cruelty.

However, I don't know of any case which has so held. The general rule is that mere failure of support is not extreme cruelty. It seems to me that we have something here more than a failure of support. We have certainly a closing of the eyes to serious family needs.

We have also allegations in the complaint that the defendant made certain accusations against the plaintiff; namely, accusations of adultery, accusations of abortion. My recollection is that the defendant denied making those accusations. However, notes which were offered into evidence, which had been written by him, indicate very definitely that these were his thinkings. My recollection is also that the defendant denied accusing the plaintiff of being mentally unfit.

At this point I will say that although I read the transcript of the deposition of Mrs. Paterson, I am not too disturbed or too impressed by the communication to Mrs. Paterson to the effect that the defendant had information that the plaintiff had been to see a psychiatrist. Let us assume and I believe it is entirely possible that the defen-

dant thought the plaintiff had been to see a psychiatrist for her own needs. There is a dispute in the testimony as to whether she had gone for her own needs or for the defendant's needs. I don't have to decide that, but very recently the defendant has said to one of the daughters, according to the daughter's testimony, that the plaintiff was mentally unfit. In one of his notes he described the plaintiff—I think this was P-35, but I am not sure which one—as someone mentally deranged even though he says that he never accused her of that. The fact that there is proof that he thought it, certainly serves to corroborate the plaintiff's testimony that he was going around making such accusations.

With respect to the complaint that the defendant denied his family medical treatment, I am not now dealing with the financial part. I already dealt with that, but the specifics dealt with in the complaint.

I already mentioned the defendant's acts with respect to circumcision which I put to one side as clearly not being cruelty. I would do the same thing with respect to the orthodontist work which he admittedly delayed. There again certainly at that time his finances were in serious straits, and I do not consider that as extreme cruelty. Then there was the adenoid operation which one of the children needed. Here again I think since the defendant had equal custody of the children, at that time he had a right to share and give into his fears as to such operations, and I cannot find on the basis of the evidence this was a lack of concern for his daughter's health.

The two incidents involving the plaintiff; namely, the alleged delay of the operation for the atopic pregnancy

in 1958 and the delay of the operation for the ovarian cyst in 1962 give me problems. At the outset I will state I find as a fact that the defendant did by his actions delay both operations. I also find as a fact, however, that the atopic pregnancy was delayed because of a genuine concern and religious concern of the defendant that this type of operation might involve a violation of his religious principles, and I think certainly on his side we can understand why he spent some time consulting with the officials of his religion. The same thing is true of the ovarian cyst operation. I find as a fact it was the defendant on his own behalf who delayed that operation even though the doctor's notes say "operation cancelled by patient." There is no question in this Court's mind that the reason for that note is that the doctor assumed that the defendant when he cancelled the operation was acting on behalf of the patient, the plaintiff. There again is my finding that the person who was concerned about the operation, the effect of the operation, the possible hysterectomy, was the defendant. The defendent's entire attitude concerning childbirth indicates to me that it was he who was concerned about the hysterectomy and not the plaintiff. I am satisfied on that and it was he who delayed the operation, but here again it was because of his religious principles. I make these findings specifically, because in this area, as in the area of finances, I am uncertain in my own mind as to whether or not under these circumstances the Court is justified in charging this defendant with extreme cruelty. I certainly agree with the plaintiff that the effect upon her was serious indeed. The effect upon her health had to be serious. I can't think of anything more damaging to the plaintiff's

health than to have to lie in bed worried about an operation and worrying about what her husband might do about it. An analogy seems to be a situation where people for religious reasons have refused blood transfusions to their children whom they love dearly because of religious principles or refused certain type of operations for the same reason. Therefore, I am uncertain as to whether or not to call this extreme cruelty. I myself would, undoubtedly so. If I were in the position of the Appellate Division, I certainly would, and if that was the only issue involved in this case, I would without hesitation say that it was extreme cruelty here. I do not have to make that determination here, because I find as a fact there are some other things in addition to those I have already mentioned which are extreme cruelty beyond any question. I am referring, of course, to the items of physical cruelty.

The complaint has alleged a number of items of physical cruelty. The first one in 1958 involving the spray gun. The defendant says this is a complete fabrication except for the fact that he was on that day spraying.

At one point in the testimony I thought he was going to establish something very convincingly to show that probably the plaintiff had gone and gotten an abortion herself. The evidence certainly falls far short of that, and the defendant himself, for reasons I do not know, declined to call it that, but he certainly wanted this Court to find, it seems to me, that the evidence that he had adduced this morning was enough to find that the plaintiff had obtained an abortion at that time. I must say the evidence is far insufficient for that purpose.

I find for a fact the incident which the plaintiff alleged occurred on that date, July 26, 1958, or thereabouts did occur in the manner in which the plaintiff described it.

Another incident which the defendant says is a figment of the plaintiff's imagination and a complete fabrication is the incident involving the black eye. I have had in this area, as I had in many areas, the serious question of credibility, and I have certainly given lengthy and serious consideration to all of the testimony and I have been sitting up after midnight on a number of nights and working holidays, weekends and so on on studying the evidence that had been introduced here. I am convinced that this is not a figment of the plaintiff's imagination. Her behavior, as testified to by everyone concerned, would indicate that it is not, because if she had wanted to manufacture a case against the defendant, she would not have said to the daughter who asked questions, "Oh, I hit my eye on the door." The circumstances indicate that what the plaintiff did was try her best to conceal from all of her family and all of her friends and co-workers the evidence that she had been beaten. To this Court that is not an unusual approach by a wife who does not want to admit to the world or to anyone else that she is having serious trouble or being beaten up. The plaintiff's testimony is that she painted her eye, not to pretend there was a black eye, but to cover up the black eye that did exist. I find that is precisely what happened.

There are other items of extreme cruelty. I will not go into all of them. I will mention a couple. The incident of December 21 and the incident of December 24. We have

testimony that coming out of those incidents there were bruises on the plaintiff's body.

We have the testimony of Sergeant Famacelli. The testimony of other people certainly has to be discounted or can be discounted to some extent. The plaintiff herself is an interested witness. Mrs. Farley is her sister. We had one witness who might have been expected to be the real decider in this case and that is Margaret O'Neill, but Margaret O'Neill showed that she was subject to suggestion, that she vacillated back and forth from one side to the other with the result that I had to weigh her testimony in the light of other circumstances and decide which items of her testimony are true and which are not true. Although there is a rule which says that if you find a person is sworn falsely in one respect, the Court may disregard all her testimony, the Court need not. A substantial part of her testimony is true. On the stand she said so and I don't think there is any question about it that the substantial part of her testimony is true, and there is other corroboration to indicate that she did in fact see bruises on the plaintiff although she gave an affidavit at one time saying that she didn't see those bruises.

I do not recall whether I made a finding with respect to the accusations of abortion and adultery. If I did not, I do find the defendant did accuse the plaintiff of having obtained abortions, of committing adultery and of being mentally deranged.

With respect to provocation I have indicated, when I was dealing with the motion to dismiss at the end of the plaintiff's case, that the one item that was then shown as alleged provocation could not be and I have stated it

again this morning and that is the filing of his complaint. We just simply cannot consider or accept the filing of a complaint as provocation. With respect to the other suggestions of provocation, I find that the evidence is insufficient to justify the acts of the defendant. I also point out that the defendant himself never claimed that he was provoked. Instead he claimed that he never committed any acts in the first place. So much for the cruelty.

I realize that I have not covered all of the allegations, but I think I have covered enough to indicate to the parties this Court's feelings. There are some allegations that I probably would not consider extreme cruelty. There may be some that I have mentioned that I would, but I think I mentioned enough for the judgment which the Court has in mind.

With the question of custody, there is no reason at all for transferring the custody from the plaintiff to the defendant. There is no indication that the defendant has any means for taking care of these children. He can't do as good a job at it as the plaintiff has been doing in the past. I have considered the various affidavits that have been previously filed. I have read the probation report, and I find nothing in any of them to convince this Court that custody should be changed.

It brings me to the last item and that is the item of the house. Here again I have to make a determination of credibility. At one point, at the very outset of the defendant's testimony, I felt that there was some probability that there was an agreement. I was confronted at that point with the possibility that the defendant agreed to put the house in the plaintiff's name in order to avoid the

tax liability. The evidence does not support that. If anything, the evidence supports that if anybody wanted the house in the plaintiff's name alone to avoid tax liability, it was the plaintiff herself. The defendant's position has been that he never was liable, that it was a corporation that was liable, and he expressed a view rightly or wrongly that there was no danger to himself. At that point when I thought there was a probability of such an agreement, I started thinking in my own mind as to the effect of the law which says if a person puts property in someone else's name to fraud credit, he is just stuck. I avoided that in favor of the defendant by concluding that if it is the plaintiff who caused him to put it in her name, certainly we shouldn't hold that against the defendant. That brings me down to the defendant's real contention, and that is that there was an agreement, and this is where I must find that the evidence is insufficient, after considering the entire evidence as distinguished from the defendant's initial testimony. The evidence is insufficient to establish any such agreement. We have a presumption when property is put in one spouse's name from one to the other there is a presumption of a gift. The evidence is the property was not put in by Mr. O'Connor. It was put by Mrs. O'Connor. There is no question about that. From her own testimony Mrs. O'Connor contrived and arranged to get this property. She arranged for a loan from her brother without the defendant's knowledge in order to help pay for the property. It was only when she got to the lawyer's office that she found out that there are some things she can't do without her husband, and in came the defendant and he signed the necessary mort-

gage papers, but the evidence is insufficient that at any time there was an agreement by the plaintiff to transfer this property to the defendant at any time or transfer half interest or any interest in the property to the defendant. Now it is established and I so find that the money that was used to pay for the house ultimately came from the defendant. The note was paid either from money earned by the defendant or from money which came from rents of the house itself. The other payment came from the defendant but in doing that and in making these payments, I must find that the defendant has not overcome the presumption that he made those payments as a gift or contribution to the plaintiff. I therefore dismiss the complaint, so much for the counterclaim rather which calls for a judgment in favor of the defendant for an interest in the house. A judgment in favor of the plaintiff for custody of the children on the complaint.

On the complaint I find for the plaintiff on the grounds of extreme cruelty. There will be a judgment nisi in favor of the plaintiff for extreme cruelty. Custody is awarded to the plaintiff until further order of the Court.

Opinion, Appellate Division

Superior Court of New Jersey, not reported.

Related Case between same parties, Docket No. A-712-66

Argued November 6, 1967—Decided December 5, 1967

Before Judges Kilkenny, Carton and Mehler.

On appeal from Superior Court, Chancery Division, Union County.

Mrs. Elinor O'Connor, appellant, argued the cause *pro se.*

Mr. John C. O'Connor, respondent, argued the cause *pro se.*

PER CURIAM

Plaintiff, divorced wife of defendant, appeals from several orders made by the Chancery Division relating to support for the four dependent children of the marriage, arrearages in payments ordered, enforcement of the arrearages by contempt and property execution, and the rights of visitation extended to and the manner of exercise thereof by defendant.

Plaintiff was granted a divorce on the ground of extreme cruelty. On defendant's appeal we affirmed. The Supreme Court denied his petition for certification. 50 *N.J.* 296 (1967). She was awarded custody of their four children. The three oldest are girls, now about 15, 13 and 12 years respectively; the youngest, a boy, is about four-years-old. Defendant was given visitation rights, hereinafter more particularly considered. The judgment *nisi*

ordered him to pay $150 bi-weekly for support of the children.

Defendant fell into arrears in making the required payments and was adjudged guilty of contempt by reason thereof. The trial judge, in the exercise of his discretion, did not jail defendant for contempt. It was felt that defendant's somewhat straitened financial circumstances and the expenses to which he was then being put in prosecuting his appeal from the judgment *nisi* warranted a withholding of such drastic action. An order was made reducing defendant's bi-weekly obligation to pay to $120, the differential of $30 from the original order to be added to the arrearages. Furthermore, plaintiff was enjoined from levying execution against certain tangible personalty which defendant and another owned as co-partners, and which was the subject matter of inventive development. Defendant had invested his available cash in this project. The trial judge was of the opinion that an execution sale would produce only a relatively minimal sum as against a much greater potential value.

We affirm the orders made by the trial court in the foregoing respects. The Court of Chancery is a court of conscience and has wide discretion in the granting and withholding of equitable relief. We find no abuse or mistaken exercise of discretion in any of these particulars. Certainly, the divorced wife and dependent children would suffer materially from a jailing of defendant. His confinement would produce no support and would possibly make the children public charges. There would also be an emotional impact upon the youthful minds if they learned their father was in jail.

So, too, the restraint upon the execution sale represents a reasonable exercise of the court's discretion. It would be folly to allow a forced sale for salvage value of this subject matter of inventive development with its substantially higher potential value. Moreover, a lending institution already has a $20,000 judgment against the partnership for moneys loaned. Additionally, the asset is owned by the partnership and may not be the subject of an execution sale to satisfy alimony and support arrearages—a personal obligation of the defendant alone.

Defendant was granted visitation rights outside of plaintiff's home to the extent of alternate Saturdays and Sundays, as well as from 5 P.M. to 6 P.M. on other days of the week. When difficulties arose between the parties as to defendant's enjoyment of these rights, the trial court gave defendant the right to enter plaintiff's home, if plaintiff did not make the children available outside the home. We stayed that order pending the appeal because it involved a serious question of the right to enter the home of another against her will. We were also concerned, on the basis of information in the transcript, that serious consequences might result during the exercise of defendant's entry, if their respective emotions flared up beyond control. Plaintiff is the sole owner of the home occupied by her and the children.

The alternate Saturdays and Sundays are obviously reasonable. Our initial reaction was that the daily visitations from 5 P.M. to 6 P.M. were unnecessary and excessive. But we ascertained that plaintiff is gainfully employed outside the home to supplement the amounts received from defendant. By reason thereof and her fur-

ther time spent away from home in studying law, plaintiff is not at the family hearth between 5 P.M. and 6 P.M. to give the children their evening meal. Defendant states that he takes care of this daily need. On that premise we find no valid basis for disturbing the trial court's allowance of this limited daily visitation so far as the time is concerned, provided the visitation is outside of plaintiff's home and so long as the children accede thereto.

We need not consider what our ruling might have been if defendant were able to and did actually contribute adequate support to enable plaintiff to be at home with the children nightly at this important hour of the day. We can merely advise that visitation orders are always subject to modification, and application may always be made to the Chancery Division as the circumstances and needs of those involved change from time to time.

We do not, however, agree with the trial court's authorizing defendant to enter plaintiff's home without her permission to effect his rights of visitation. Defendant's visitation rights can be insured by means other than the sanctioning of what otherwise would be a trespass. Nor may defendant justify his unwanted intrusions into plaintiff's home by his allegation that the children invited him in. Unless plaintiff consents to the entry, defendant has no right to enter into the privacy of her habitation.

Nor may defendant's obligation to pay for the support of the children or enforcement as to arrearages be made contingent upon plaintiff's cooperation in the matter of visitation. These are independent provisions. Obviously, the welfare of the children may not be circumscribed because of some alleged interference by plaintiff with defendant's full enjoyment of his rights of visitation.

Plaintiff's motion to supplement the record by her affidavit and a confirmatory police report as to an incident involving one of the children is denied. The incident occurred during the pendency of this appeal, is merely cumulative at best, and is not material to a resolution of the issues before us. We also deny defendant's request to direct production of the children at oral argument. They were not produced and there was no good reason for their presence before us.

Except to the extent that there should be deleted the provision authorizing defendant's entry into plaintiff's home without her permission, and cessation of payments of support or enforcement of arrearages, if and while defendant's rights of visitation are interfered with by plaintiff, the orders under review are affirmed. No costs by either party as against the other.

Extract From Dissenting Opinion in Another Case by Judge Goldmann

SUPREME COURT OF NEW JERSEY

A-17 September Term 1967

50 N.J. (1967)

CLARA LOEB,

plaintiff-respondent,

VS.

WILLIAM A. LOEB,

defendant-appellant.

GOLDMANN, S.J.A.D. (temporarily assigned) (dissenting)

The single question presented for resolution on this certified appeal is whether plaintiff wife, who prevailed in her divorce action may in the circumstances of this case, at will and without advancing any cause whatever, have her judgment *nisi* vacated. The Chancery Division denied that relief, 89 *N.J. Super.* 568 (1965); the Appellate Division reversed the determination on appeal, 91 *N.J. Super.* 333 (1966). In light of the factual setting presented, I would reverse and reinstate the Chancery Division judgment.

• • • • •

Extract From Dissenting Opinion in Another Case

(12-20)

The State has every interest in preserving the marital bond where there is even a suggestion of reconciliation. No such possibility appears here. The marriage is dead. That being so, the State's only concern should be to give it a proper burial instead of insisting on a state of unholy deadlock.

(13-13)

It *is neither realistic* nor does it *comport with the social interest* to speak, as did the appellate court, of the policy favoring maintenance of the marital relation—*at least in a case like this.* Nelson, in the third volume of his *Divorce and Annulment* (*2d ed.* 1945), § 2807, *pages* 133-134, *reflects a view more reasoned and responsive to the crippling influence of an adjudicated marital failure:*

> "The law, it is said, favors a reconciliation of the parties to a marriage even after divorce is filed and granted by interlocutory decree. In this it is somewhat meddlesome, old-maidish and contrary to sound human experience and statistics; but the principle sounds benign and sanctimonious, so it will probably be reiterated in the future as in the past because it rings so beautifully even though it is so demonstrably false in precept. After the parties to a marriage have reached the bill for divorcement stage, they rarely get together again except for the temporary gratification of their passions, and then only until one or the other of them remembers what went on before and calls on the nearest counsellor at law. Occasionally, of course, there is an actual reconciliation and forgiveness. In that event, if the court is advised of it, a final decree of divorce should not be entered."

Extract From Dissenting Opinion in Another Case

(14-1)

Insofar as New Jersey is concerned, Nelson's observation is no mere speculation. Our State experimented with reconciliation under judicial auspices when it adopted *R.R.* 4:94A in June 1957. The rule was to remain in force for a period of three years unless extended or revoked. It was formally deleted as of July 1, 1960, evaluation of the program having *indicated that it had been effective in less than 3% of the cases.* If efforts at reconciliation produce so meagre a result when exerted prior to the litigation being permitted to go beyond the filing of the complaint, *how much more improbable would reconciliation be after the matter had been fully tried out and a nisi entered?* In light of our recent experience it would indeed be idle to say that an otherwise sound policy favoring preservation of marriages would in any way be benefitted or advanced by permitting plaintiff to recall her judgment *nisi* in the circumstances here present.

Although a majority of the courts that have dealt with the issue under consideration have, on the basis of public policy, held that the successful spouse has the right to vacate the judgment *nisi* upon timely application, without more, others have reached a contrary result. *These courts have been more concerned with the integrity of the judicial process than in preserving for the litigant a unilateral option to reverse a judgment reached after thoughtful consideration of the proofs.*

Judgment Nisi of Trial Court

Judge William Fillmore Wood

Superior Court of New Jersey

Chancery Division, Union County

Docket No. M-5519-63

Filed July 18, 1966

This action coming on to be heard in the presence of Hughes, Hartlaub and Thorn, Attorneys for the Plaintiff, ELINOR O'CONNOR, John P. Breen, Esq. appearing, and Kentz, Kentz & Gilson, Attorneys for the Defendant, JOHN C. O'CONNOR, Frederick C. Kentz, Jr., Esq., appearing, upon the Amended Complaint and upon proofs being taken in open Court, and the Court having heard and considered the proofs in this action and the arguments of Counsel, and the Court having rendered an oral opinion herein on June 1, 1966, and it appearing that Plaintiff and Defendant were joined in the bonds of matrimony on or about October 28, 1950, and that the Defendant has been guilty of extreme cruelty toward the Plaintiff, such cruelty having been alleged in the Amended Complaint, and that at the time the cause of action for divorce for said extreme cruelty arose, Plaintiff was an actual bona fide resident of this State, and the Plaintiff has continued so to be down to the time of the commencement of this action, and that Plaintiff has been for two years next preceding the commencement of this action an actual bona fide resident of this State, and it further appearing that jurisdiction herein

has been acquired by personal service of process upon Defendant within this State:

IT IS thereupon, on this 18th day of July, 1966, by the Superior Court, Chancery Division, of the State of New Jersey, ORDERED and ADJUDGED, and the said Court, by virtue of the power and authority of this Court and of the acts of the Legislature in such case made and provided, does hereby ORDER and ADJUDGE that the said Plaintiff, ELINOR O'CONNOR, and the said Defendant, JOHN C. O'CONNOR, be divorced from the bond of matrimony for the cause aforesaid, and the said parties, and each of them, be freed and discharged from the obligations thereof, unless sufficient cause be shown to the Court why this Judgment should not be made absolute, within three months from the date hereof.

IT IS FURTHER ORDERED that the Plaintiff, ELINOR O'CONNOR, shall have custody of the infant children of the marriage, Christine O'Connor, born September 21, 1951, Valerie O'Connor, born May 26, 1953, Amy O'Connor, born November 25, 1954 and Christopher O'Connor, born May 16, 1963; and

IT IS FURTHER ORDERED that JOHN C. O'CONNOR, the abovenamed Defendant, pay to the Plaintiff, ELINOR O'CONNOR, the sum of $150.00 every two weeks at the beginning of every other week as of and from June 6, 1966, and until further Order of this Court, said payments to be allocated for the support and maintenance of the infant children only, in the amount of $37.50 for each child and no part of said payments being allocated to the Plaintiff for sup-

port and maintenance until the further Order of this Court. Support payments provided herein are to be made through the Union County Probation Office.

IT IS FURTHER ORDERED that the arrearages which have accrued as of June 1, on previous Orders for support Pendente Lite, be and the same are hereby confirmed, in the amount of $1,980.00. However, payment of $1,860.00 of said arrearages is hereby suspended until further Order of this Court.

IT IS FURTHER ORDERED that the Defendant shall be liable and responsible for payment of and shall pay, all reasonable charges for extraordinary medical and dental care or treatment, including chronic or protracted conditions or disorders, for the children of the marriage or any of them, upon reasonable notice to the Defendant, except that in any case of emergency the Defendant need not be given notice, and the Defendant shall be responsible for payment of all accrued or outstanding medical and dental bills or charges incurred or in effect prior to the first of August, 1964, including $325.00 due Andrew J. Genualdi, D.D.S., for orthodontic treatment of Christine O'Connor; and

IT IS FURTHER ORDERED that the Defendant shall pay all municipal taxes and interest due as of June 1, 1966, assessed against the dwelling house and premises situated at 13 Oak Knoll Road, Summit, New Jersey, which serves as shelter for the Plaintiff and the four minor children of the parties; and

IT IS FURTHER ORDERED that the Defendant shall reimburse the Plaintiff for taxes paid by the Plaintiff during the

pendency of this action, which said taxes were to have been paid by the Defendant by virtue of the Order entered on September 13, 1965, said reimbursement to be in the sum of $803.00; and

~~IT IS FURTHER ORDERED that if there be default in any payment required to be made by the Defendant under any~~ existing Order or with respect to any of the matters hereinabove set forth, the cause shall be relisted for further proceedings on five days written notice to Defendant or Attorney for Defendant; and

IT IS FURTHER ORDERED that the Defendant may have reasonable visitation with the children of the marriage away from the home of the children and Plaintiff, Saturday and Sunday from 2:00 P.M. to 6:00 P.M. and such further visitation as the parties may mutually agree. Neither party shall prejudice the minds of the children or any of them against the other, nor shall either party commit any act or do anything which may adversely affect the health, happiness or welfare of the children; and

IT IS FURTHER ORDERED that the Defendant shall refrain from disturbing or interfering with the conduct of Plaintiff's household and home and shall not enter the home or premises of Plaintiff except with consent of Plaintiff or for the purpose of obtaining the children for visitation as permitted by Order of this Court; and

IT IS FURTHER ORDERED that either party may apply for modification of visitation or custody and retroactive modification of support; and

Judgment Nisi of Trial Court

IT IS FURTHER ORDERED that the Defendant's Counterclaim for an interest in the real property located at 13 Oak Knoll Road be and the same is denied; and

IT IS FURTHER ORDERED that the Defendant shall pay to Hughes, Hartlaub and Thorn, Attorneys for the Plaintiff, a Counsel fee of $2,600.00, plus taxed costs, however no execution to issue for collection of same until and unless leave of Court is obtained.

WM. FILLMORE WOOD
J.C.C./T.A.

I hereby certify that the foregoing is a true copy of the original on file in my office.

MORTIMER G. NEWMAN JR.

Extract From Transcript of Proceedings Dated June 1, 1966

Commencing at page 98, line 26. NOTE: This extract is the last statement of the trial Court before the Bench Opinion.

The Court: All I know and all I am satisfied with in my own mind is that Mr. O'Connor does not want this divorce. You took the trouble of asking him the question which to me was obvious as the nose on your face. He doesn't want it. He wouldn't take a month of the Court's time fighting. He has made it clear to me throughout the motions that I heard he wants to get back, and he doesn't think there is any grounds even now for divorce. Never once has there been any suggestion to me that the avenue that he had in mind for getting back was mending his wife's. There hasn't been the slightest suggestion of that. It has been, I have done nothing. Mrs. O'Connor is an actress and a faker. There is no basis for the suit. Therefore, hurry up and let me get back home. This has been his attitude.

I am satisfied that in the general sense of the term reconciliation Mr. O'Connor wanted reconciliation, but not that he wanted to stop doing what Mrs. O'Connor is complaining of. All right (R. 98, June 1, 1966; also C.A. 81a).